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Kathryn Ma Wai Fong v Shunrise Megaway Sdn Bhd

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HIGH COURT (SHAH ALAM) — COMPANIES WINDING-UP NO BA-28NCC-462–10 OF 2016
VAZEER ALAM J
3 SEPTEMBER 2018

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Companies and Corporations — Winding up — Liquidators — Appointment of — Nomination of persons as liquidator for wound up company — Whether issue of alleged impartiality should be addressed — Companies Act 1965 s 218(1)(b) & (i)

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The petitioner filed this petition pursuant to s 218(1)(b) and (i) of the Companies Act 1965 to wind-up the respondent on several grounds. The petitioner was the executrix of the estate of Wong Kie Nai that held 80,000 shares in the respondent. One of the other contributories, namely, Datuk Wong Kie Yik ('WKY') who held 19,998 shares initially filed a notice to oppose the petition. The petitioner and WKY had since agreed to wind up the respondent on grounds that it had lost its substratum. The only remaining issue was the choice of the liquidator. The petitioner nominated Lim San Peen from Pricewaterhousecoopers Advisory Services Sdn Bhd ('PWC') whilst WKY proposed Wong Ching Yong of Messrs Wong Ching Yong & Co, who was based in Sibu, Sarawak.

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Held:

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(1) The cost of liquidation would be needlessly increased if Lim San Peen was appointed as the liquidator. The appointment of Lim San Peen who was based in Kuala Lumpur would incur more cost to the respondent as compared to Wong Ching Yong who was from Sibu (see para 4).

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(2) The respondent would not have enough to repay its creditors. Hence, the cost of liquidation ought to keep to a minimum. There was no commercial nor logical justification to increase the cost of liquidation by appointing Lim San Peen from Kuala Lumpur, which would be costlier. It was more logical and reasonable to appoint Wong Ching Yong from Sibu, a local man who was equally experienced and qualified to carry out the liquidation at a lower cost. This would be in the best interest of the creditors and contributories of the respondent as the cost of liquidation would be far less and there would be more funds available for distribution to creditors (see para 5).

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(3) Both Lin San Peen and Wong Ching Yong were equally qualified and experienced to carry out the liquidation of the respondent. Further, this was not a case of liquidation of a group of related companies that would warrant the appointment of a common liquidator. Though the respondent's shareholders may be also be shareholders in the other ten companies in liquidation, the respondent was a stand alone company. There was no evidence showing any linkages between the respondent and the other ten companies where Lim San Peen was the liquidator. Thus, there were no discernible advantages to be gained from appointing the same liquidator for the respondent company (see para 6).

(4) The issue of the alleged impartiality of Lim San Peen related to the liquidation of a company called Artic Star Sdn Bhd and it would only be proper for a complaint be raised before the appropriate winding-up court. The court did not wish to address the alleged impartial and questionable conduct of Lim San Peen as liquidator. That belonged in another forum. Based on the above findings, the court ordered that Mr Wong Ching Yong of Messrs Wong Ching Yong & Co, Sibu, Sarawak, be appointed the liquidator of the respondent following the winding up of the respondent as agreed by the parties (see paras 7–8).

[Bahasa Malaysia summary

Pempetisyen memfailkan petisyen ini berdasarkan s 218(1)(b) dan (i) Akta Syarikat 1965 untuk menggulung responden atas beberapa alasan. Pempetisyen adalah pelaksana harta pusaka Wong Kie Nai yang memegang 80,000 saham responden. Salah satu penyumbang lain, iaitu Datuk Wong Kie Yik ('WKY') yang memegang 19,998 saham pada mulanya memfailkan notis untuk menentang petisyen itu. Pempetisyen dan WKY sejak itu sepakat untuk menggulung responden dengan alasan ia telah kehilangan substratum. Satu-satunya isu yang tinggal adalah pemilihan pelikuidasi. Pempetisyen menamakan Lim San Peen dari Pricewaterhousecoopers Advisory Services Sdn Bhd ('PWC') manakala WKY mencadangkan Wong Ching Yong dari Tetuan Wong Ching Yong & Co, yang berpusat di Sibu, Sarawak.

Diputuskan:

(1) Kos penggulungan akan meningkat secara sia-sia jika Lim San Peen dilantik sebagai pelikuidasi. Pelantikan Lim San Peen yang berpusat di Kuala Lumpur akan menanggung kos yang lebih tinggi kepada responden berbanding Wong Ching Yong yang berasal dari Sibu (lihat perenggan 4).

(2) Responden tidak akan cukup untuk membayar balik pemiutangnya. Oleh itu, kos penggulungan sepatutnya minimum. Tidak ada justifikasi yang wajar dan logik untuk meningkatkan kos penggulungan dengan melantik Lim San Peen dari Kuala Lumpur, yang lebih mahal. Lebih

logik dan masuk akal untuk melantik Wong Ching Yong dari Sibu, seorang lelaki tempatan yang berpengalaman dan berkelayakan untuk menjalankan penggulungan pada kos yang lebih rendah. Ini akan menjadi kepentingan terbaik para pemiutang dan penyumbang responden kerana kos penggulungan akan jauh lebih rendah dan akan ada lebih banyak dana yang tersedia untuk diedarkan kepada pemiutang (lihat perenggan 5).

(3) Kedua-dua Lin San Peen dan Wong Ching Yong sama-sama layak dan berpengalaman untuk menjalankan penggulungan responden. Tambahan lagi, ini bukanlah suatu kes penggulungan sekumpulan syarikat yang berkaitan yang akan menjamin pelantikan pelikuidasi biasa. Walaupun para pemegang saham responden juga boleh menjadi pemegang saham dalam sepuluh syarikat lain dalam penggulungan, responden adalah syarikat yang berdiri sendiri. Tiada bukti menunjukkan sebarang hubungan antara responden dan sepuluh syarikat lain di mana Lim San Peen adalah pelikuidasi. Oleh itu, tidak terdapat kelebihan yang dapat diperoleh daripada melantik pelikuidasi yang sama untuk syarikat responden (lihat perenggan 6).

(4) Isu yang mendakwa ketidakadilan Lim San Peen yang berkaitan dengan penggulungan sebuah syarikat yang dinamakan Artic Star Sdn Bhd dan ia hanya sesuai untuk aduan dikemukakan di hadapan mahkamah penggulungan yang sesuai. Mahkamah tidak berhasrat untuk menangani ketidakadilan dan kelakuan yang dipersoalkan yang didakwa oleh Lim San Peen sebagai pelikuidasi. Ianya termasuk di dalam forum yang lain. Berdasarkan penemuan di atas, mahkamah memerintahkan supaya Wong Ching Yong dari Tetuan Wong Ching Yong & Co, Sibu, Sarawak, dilantik sebagai pelikuidasi responden berikutan penggulungan responden seperti yang dipersetujui oleh pihak-pihak (lihat perenggan 7–8).]

Notes

For cases on liquidators, see 3(1) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 1645–1709.

Legislation referred to

Companies Act 1965 s 218(1)(b), (1)(i)

Vazeer Alam J:

[1] The petitioner, filed this petition pursuant to s 218(1)(b) and (i) of the Companies Act 1965 to wind up the respondent on several grounds. The petitioner is the executrix of the estate of Wong Kie Nai that holds 80,000 Wong Kie Yik ('WKY') who holds 19,998 shares initially filed a notice to

oppose the petition. The remaining two shareholders, who each hold ine share have not appeared on the petition.

[2] The petitioner and WKY have since agreed to wind up the respondent on grounds that it has lost its substratum. The only remaining live issue was the choice of the liquidator. The petitioner nominates Mr Lim San Peen from Pricewaterhousecoopers Advisory Services Sdn Bhd ('PWC') whilst WKY proposes Mr Wong Ching Yong of Messrs Wong Ching Yong & Co, who is based in Sibu, Sarawak.

[3] Having considered the arguments of counsel, I had made an order appointing Mr Wong Ching Yong of Messrs Wong Ching Yong & Co as the liquidator of the respondent for the following reasons.

[4] I agree with submissions of learned counsel for WKY that the cost of liquidation will be needlessly increased if Mr Lim San Peen is appointed the liquidator. This is a material fact for the court to take into consideration. There is no dispute that the appointment of Mr Lim San Peen who is based in Kuala Lumpur would incur more cost to the respondent as compared to Mr Wong from the following factors:

(a) though the respondent's registered address is in Selangor, the business of the respondent was primarily conducted in Sarawak and most of the creditors are from Sarawak;

(b) all the directors and shareholders of the respondent are residing in Sarawak or have addresses in Sarawak;

(c) the respondent's moveable and fixed assets are situated in Sarawak and the sale and liquidation of these assets would logically be held in Sarawak;

(d) the practical convenience of convening meetings of the creditors and contributories as well as the committee of inspection in Sarawak as opposed to Kuala Lumpur is rather obvious; and

(e) the appointment of Mr Lim San Peen would incur cost of air travel to/from Kuala Lumpur and Sarawak as well as accommodation for him and his supporting team of professionals, when conducting meetings or when attending to affairs related to the liquidation.

[5] The last audited financial statement for financial year ended 30 June 2012 lodged with the Companies Commission of Malaysia ('CCM') shows that the respondent has no real property and has insignificant moveable fixed assets and given that the respondent has ceased trading since 2014 after the logging agreements with the Sarawak Timber Industry Development Corporation ('STIDC') expired. Based on the same audited financial statement, the respondent has accumulated losses of RM6,370,789 and the

total liabilities exceed the total assets by RM6,270,789. The cash and bank balances stands at RM65,628 as at 30 June 2012. Even if the respondent recovers all debts from its debtors, it will not have enough to repay its creditors. In the circumstances, I find that the cost of liquidation ought to keep to a minimum. I agree with submissions of counsel for WKY that there is no commercial nor logical justification to increase the cost of liquidation by appointing Mr Lim San Peen from Kuala Lumpur, which would be costlier. I find it more logical and reasonable to appoint Mr Wong Ching Yong from Sibu, a local man who is equally experienced and qualified to carry out the liquidation at a lower cost. This would be in the best interest of the creditors and contributories of the respondent as the cost of liquidation would be far less and there would be more funds available for distribution to creditors.

[6] Learned counsel for the petitioner submits that Mr Lim San Peen comes from PWC, a reputable and established firm with the necessary resources to brought the attention of the court to Mr Lim San Peen's appointment as liquidator for ten other companies where the parties are also involved in. Thus, counsel argues that it would be desirable from the point of view of ease of administration and expense that Mr Lim San Peen be appointed as the liquidator of the respondent. I do not find any merit in this argument. I find that both Mr Lin San Peen and Mr Wong Ching Yong are equally qualified and experienced to carry out the liquidation of the respondent. Further, this is not a case of liquidation of a group of related companies, that would warrant the appointment of a common liquidator. Though the respondent's shareholders may be also be shareholders in the other ten companies in liquidation, the respondent is a stand alone company. There is no evidence showing any linkages between the respondent and the other ten companies where Mr Lim San Peen is the liquidator. Thus, there are no discernable advantages to be gained from appointing the same liquidator for the respondent company. In fact in another case involving petitioner in the Sibu High Court, similar issue relating to the appointment of a liquidator for six companies that were ordered to be wound up the learned judge had this to say:

> *On the issue of the appointment of the liquidator, to my mind where they are 2 equally qualified and competent liquidators, it makes no sense to appoint the liquidator that is based at a distance for instance based in West Malaysia. The benefit of appointing a locally based liquidator is obvious: it will save costs for all parties*. As for the point raised by the contributories with regard the conduct of Mr Lim San Peen I will not pass judgment on the merits of the issue except to say that there is much unhappiness on the part of the contributories. And this is not conducive to the efficient carrying out of the duties of a liquidator. So in the exercise of my discretion I will appoint Mr Wong Ching Yong to be the liquidator for all six companies.

[7] Learned counsel for WKY also raised the issue of Mr Lim San Peen's alleged impartially in the present proceedings, just as it was raised in the matter

before the Sibu High Court. I am of the view that the issue of the alleged impartiality of Mr Lim San Peen relates to the liquidation of a company called Artic Star Sdn Bhd and it would only be proper for a complaint be raised before the appropriate winding-up court. And for similar reasons espoused by the learned judge in the Sibu High Court case, I too do not wish to address the alleged impartial and questionable conduct of Mr Lim San Peen as liquidator. That belongs in another forum.

[8] As for the learned judge's reasoning on the cost aspect of the appointment of a liquidator, I wholly adopt and apply the reasoning espoused therein that it does not make any sense for a more expensive liquidator from afar to be appointed when an equally competent and qualified local liquidator is available at less cost. Wherefore, I ordered that Mr Wong Ching Yong of Messrs Wong Ching Yong & Co, Sibu, Sarawak, be appointed the liquidator of the respondent following the winding up of the respondent as agreed by parties.

Order accordingly.

Reported by Ahmad Ismail Illman Mohd Razali